IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EARL BRUBAKER,

Appellant,

vs.

FRED R. DICKSON, Warden of the California State Prison at San Quentin, California,

Appellee.

No. 17583

PETITION FOR REHEARING

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TABLE OF CASES

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PETITION FOR REHEARING

A rehearing should be granted in this case by this Honorable Court for the following reasons:

I

The decision of this Court erroneously holds that the Public Defender of Los Angeles County is an "employee of the State." This is contrary to fact and longstanding California law (In re Hough, 24 Cal.2d 522, 528-9; In re Atchley, 48 Cal. 2d 408, 418, 310 P.2d 15; People v. Lewis, 166 Cal.App.2d 602, 607; 333 P.2d 428).

II

The decision of this Court holds, in effect, that because petitioner's trial counsel did not do certain things relative to the conduct of his defense, the legal representation afforded to petitioner was constitutionally inadequate and

amounted to a farce or sham. It is respectfully submitted that neither the petition filed with this Court nor the trial court record substantiates this conclusion and it is, therefore, erroneous.

III

The decision of this Court fails to distinguish between those cases wherein a criminal defendant was completely denied his right to counsel or where only a token appearance by counsel was made and those cases wherein an appellate court disagrees with certain actions taken by counsel or where the court feels counsel could have done a better job of representation than he actually did. In the first situations, a strict standard should be, and is, imposed on the States. But in the latter situations, an appellate court cannot and should not set itself up as a critical board of review over counsel's choices of actions. This is what has been done by this Court in this case. When the defendant is represented by counsel in a criminal case, there is no state action involved sufficient to justify the issuance of a federal habeas corpus writ unless the actions of that counsel are so lacking in merit as to amount to a farce or sham, and this lack of effective representation was, or should have been, obvious to the trial judge (United States v. Handy, 203 F.2d 407, 427 (3rd Cir. 1953); cert. denied 346 U.S. 869; Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945); cert. denied 325 U.S. 889).

IV

The United States District Court made a specific finding that petitioner did receive adequate representation by counsel at the time of his trial (see order dated July 3, 1961), and the district court made similar comments during the lengthy hearings held on this case (RT I 38, 53; RT III 13-14, 20, 31-32, 38-39). The district court further found that petitioner's confessions were not coerced from him by the police (RT III 37-38). This Court has now held there is no evidence in the record to sustain these findings, and it is respectfully submitted this conclusion by this Court is unwarranted and legally incorrect.

V

The decision of this Court holds that petitioner's allegations regarding the alleged manner in which his confessions were obtained must be considered by this Court in determining the adequacy of the representation afforded to him. This is clearly erroneous in view of his failure to object to the admission of these confessions at the time they were offered into evidence, and in view of the appellant's own admissions in his confessions as to <u>why</u> he was confessing (RT 136, 153), and how fairly he had been treated by the police (RT 106, 163).

VI

The heart of this Court's decision is contained on page 3 of the decision wherein this Court holds that a petitioner should be afforded an opportunity to support his

allegations by proof of matters outside of the trial record. This conclusion is legally erroneous and will necessarily involve the review of many criminal convictions by the federal district court by means of a special hearing in order to see if the defendant received what the reviewing court feels was adequate representation by counsel. Such a procedure is not, and never has been, the rule in this country in either the federal or state courts.

VII

While the decision of this Court quotes from a mass of psychiatric testimony obtained by him after trial to show some sort of mental defect on his part, the decision almost completely ignores the psychiatric examination given to petitioner before trial, which found him to be sane, and which obviously and properly formed the basis for his counsel not securing further psychiatric examinations.

VIII

The effects of liquor and alleged inability to form specific intent are largely irrelevant to petitioner's conviction since he killed in the course of an attempted rape, making it felony murder.

IX

The decision paints petitioner as a virtual "babe-in-the-woods" in regards to contacts with police and the criminal law; as a matter of fact, he had a prior felony record and was far from a novice in this regard. For instance, he knew

enough about his rights to ask for a lawyer. Further, there is no obligation on the police in California to advise him of his right to remain silent (People v. Kendrick, 56 Cal. 2d 71, 83; 363 P.2d 13).

X

The court's decision takes three pages to set out what petitioner's trial counsel did not do and what this Court thinks he should have done, but it makes no point of what he did do and the strategy he obviously employed in trying the case. This Court may not agree with the strategy, but at least it should recognize that a strategy did exist (see, for instance, People v. Gains, 58 AC 644, 646-51).

XI

Trial counsel here was counsel in the case of People v. Stroble, 36 Cal.2d 615; Stroble v. California, 343 U.S. 181, 96 L.Ed. 872 (see affidavit of Buckley dated 27 June 61 and filed with Dist. Ct. that date). He was obviously aware of the decision in Crooker v. California; yet this Court does not even consider the possibility that he decided this case did not fall within those decisions.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that a rehearing should be granted in this case, and that upon rehearing the matter should be heard by this Honorable Court *en banc*.

Dated: December 13, 1962

STANLEY MOSK, Attorney General
of the State of California

JOHN S. McINERNY,
Deputy Attorney General

Attorneys for Appellee

JOHN S. McINERNY, Deputy Attorney General of the State of California, under penalty of perjury, hereby certifies that in his judgment this petition for rehearing is well founded and that it is not interposed for purposes of delay.